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UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION  
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CLERK OF COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA, FLORIDA

UNITED STATES OF AMERICA

v.

SAMI AMIN AL-ARIAN,  
SAMEEH HAMMOUDEH,  
GHASSAN ZAYED BALLUT,  
HATIM NAJI FARIZ

CASE NO.: 8:03-CR-77-T-30-TBM

**GOVERNMENT'S MOTION FOR A RULE 16(d)(1) PROTECTIVE ORDER**

The United States of America by Paul I. Perez, United States Attorney, Middle District of Florida, respectfully submits its Motion for a Rule 16(d) Protective Order, and states as follows:

1. Attached hereto is a proposed Protective Order, submitted pursuant to the authority provided in Rule 16(d)(1) of the Federal Rules of Criminal Procedure. This Order relates to a segment of the documents and other items obtained from the State of Israel pursuant to the Mutual Legal Assistance Treaty between the United States and Israel. The segment at issue involves photographs and medical reports of victims of terrorist attacks described in hospital reports, autopsy reports, bomb technician reports and similar documents. Collectively, the material at issue is called "sensitive information." The purpose of the Order is to limit the dissemination of this material to protect the privacy interest of the victims of the attacks and the security interest of the Israeli government and its inhabitants.

468

2. The Israeli material consists of various documents and reports, mostly pertaining to the terrorist attacks described in the Overt Acts of Count One of the Indictment. Victims of these attacks or their surviving families have legitimate privacy concerns. The documents and reports include medical reports of the victims, which in some cases contain graphic photographs or written descriptions of the wounds suffered by the victims. The bomb technician reports also may contain similar information. The bomb technician reports also contain a description and analysis of the bomb in question, which in most cases was a unique or improvised device and not an off-the-shelf item. Disclosure of such information to the media or a criminal or terrorist organization would allow others inclined to employ such methods to learn how to build them.

3. By its terms, Rule 16 of the Federal Rules of Criminal Procedure contemplates that discovery material exchanged between the parties will be done so informally and not channeled through the public record. A request is made by one party and the other party complies. This procedure is reinforced by local standard discovery orders which provide that the parties should conduct discovery informally amongst themselves without involvement of the Court (unless there is an unresolvable dispute).

4. The purpose of discovery in a criminal case is to allow the parties to know something of the other side's case so that each side will be better prepared for trial and the trial itself can be conducted expeditiously and the truth can be discovered fairly in accordance with the rules of procedure and evidence. Defense preparation may include a thorough factual investigation using material provided in discovery.

5. Even in the absence of a protective order, discovery material provided by one party to the other should not legitimately find its way into the public record, or into the hands of the news media, a lobbyist group, a book publisher or a criminal organization. The only legitimate use for the material is to prepare the criminal case for trial.

6. In this case, notwithstanding the limitation built into Rule 16 itself, discussed above, it is entirely appropriate to enter the proposed Order. Given the sensitive nature of the information from security and privacy perspectives, the potential for sensational use or publication by others, and the privacy concerns of the victims depicted or discussed in these materials, there is “good cause” to restrict discovery as provided in the proposed Order. The Order strikes the appropriate balance between the government’s privacy and security concerns and the defense teams’ need to review, analyze and use the information.<sup>1</sup>

#### **MEMORANDUM OF LAW**

Rule 16(d)(1) of the Federal Rules of Criminal Procedure governs protective and modifying orders during the discovery process. Pursuant to this Rule, the district court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief, including the issuance of protective or modifying orders. Such a request may be made ex parte. The decision to enter a protective order under this rule

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<sup>1</sup> The government’s concern is not merely a theoretical one. On January 30, 2004, FBI Special Agent William Aponte, while monitoring a review of the discovery material by defendants Al-Arian and Hammoudeh, observed defendant Al-Arian attempting to secretly remove one of the documents upon departure. Agent Aponte thwarted the attempt.

is a matter for the discretion of the district court and will not be disturbed on appellate review absent an abuse of that discretion. See United States v. Giraldo, 822 F.2d 205, 212 (2d Cir. 1987); United States v. Merrill, 746 F.2d 458, 465 (9th Cir. 1984); United States v. Coiro, 785 F.Supp. 326, 330 (E.D.N.Y. 1992). An abuse of discretion in administering discovery rules only justifies reversal where the defendant's substantive rights have been prejudiced. See United States v. Hourihan, 66 F.3d 458, 464 (2d Cir. 1995) (discovery violation under Rule 16(a)(1)(A) warrants new trial only if defendant can demonstrate failure to disclose caused "substantial prejudice"); United States v. Woosley, 761 F.2d 445, 448 (8th Cir. 1985); United States v. Crisona, 416 F.2d 107, 115 (2d Cir. 1969); Coiro, 785 F.Supp. at 330. By this motion, the United States seeks a protective order restricting discovery to protect certain privacy and security concerns it has arising out of the content of the material in question.

Courts have fashioned protective orders for a variety of reasons. For example, the Eight Circuit affirmed the district court's protective order shielding surveillance tapes from disclosure to a criminal defendant where safety of the witnesses was at issue and the court concluded that the tapes contained no exculpatory material. See United States v. Pelton, 578 F.2d 701, 706-07 (8th Cir. 1978); United States v. Aiken, 76 F.Supp.2d 1339, 1343 (S.D. Fla. 1999) (witness safety). Likewise, commercial information utilized in criminal proceedings may also be subject to a protective order. See United States v. Hsu, 155 F.3d 189, 205-06 (3rd Cir. 1998); United States v. International Business Machines Corp., 67 F.R.D. 40, 44-45 (S.D.N.Y. 1975). Courts have also granted protective orders regarding unclassified, but sensitive material which

was deemed “vital to national security,” see United States v. Lindh, 198 F.Supp.2d 739, 742 (E.D. Va. 2002), citing United States v. Moussaoui, Criminal No. 01-455-A (E.D. Va. Feb. 5, 2002) (order) and United States v. Bin Laden, 58 F.Supp.2d 113, 121 (S.D.N.Y. 1999), and intelligence information provided by a foreign government, see United States v. Felt, 491 F.Supp. 179, 187-88 (DC 1979).

The court, however, must be careful to balance the need to protect information from disclosure against a criminal defendant's due process right of access to such information in preparing and presenting a complete defense. See Lindh, 198 F.Supp.2d at 742. To that end, the court may order a defendant and his counsel not to disclose material which they are entitled to inspect, see Alderman v. United States, 394 U.S. 165, 185 (1969); United States v. Caparros, 800 F.2d 23, 24 (2d Cir. 1986) (upholding use of a protective order to prevent defendant's disclosure of items produced in discovery), or may limit disclosure only to defense counsel, defense investigators or an expert witness. See United States v. Anderson, 509 F.2d 724, 729 (9th Cir. 1974) (district court can order defense counsel not to disclose to defendant information learned during in camera proceedings concerning informant identify); Lindh, 198 F.Supp.2d at 742-43.<sup>2</sup>

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<sup>2</sup>Protective orders limiting or preventing disclosures of discovery material to others do not infringe on any First Amendment rights. Discovery that is available to a litigant for the purposes of trial preparation is not the sort of information traditionally available to the public. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984). Privacy interests of litigants and third parties may be adversely affected by public release of the materials. Id. at 35. While Seattle Times Co. involved a protective order in a civil case, its reasoning applies to a criminal case as well. See United States v. Smith, 602 F.Supp. 388, 395-96 (M.D. Pa. 1985).

The proposed Protective Order merely seeks to restrict access to certain Israeli documents, not to deny access. For the reasons stated in the motion, the material is sensitive in nature. While the charges in the Indictment are certainly serious, the need for the defense to examine these particular materials is not great. First, in the present case, there can be no serious dispute that the violent acts alleged in the Indictment occurred. Second, there can further be no serious dispute that people died as a result of bombings or shootings. As to the nature and extent of wounds, the pathology reports and other medical reports merely confirm the obvious. With respect to connecting the PIJ to the acts of violence, the defendants have received much discovery material relating to the violent acts charged in the Indictment, including copies of facsimiles and tapes of conversations, some which acknowledge that these violent acts were committed by the Palestinian Islamic Jihad (PIJ). Some of these facsimiles and conversations have been alleged as overt acts in Count One of the Indictment; some have not. See OA 23; OA 52; OA 84; OA 85; OA 87; OA 94; OA 110-114; OA 116-120; OA 123; OA 125; OA 127; OA 139; OA 146; OA 148; OA 152; OA 153; OA 238-240; OA 255. In addition, public source information (including the PIJ website) acknowledges PIJ responsibility for many of the violent acts alleged in the Indictment. See OA 233. The website identifies the perpetrators, the means, the location, the victims, and the result. Accordingly, complete access by the defendants to their own copy of the few Israeli documents which contain sensitive information regarding pathology reports and photographs and bomb analysis is not vital to the preparation and presentation of a “complete” defense. This is particularly true in the

light of the fact that the United States has not alleged that the defendants were constructors of the various bombs utilized in these attacks, or that they were the individuals who detonated the bombs or brandished weapons during these violent attacks, or even personally committed any of the acts of violence.

The United States' proposed Protective Order seeks only to limit defense counsel's access to a small percentage of the foreign documents. At the insistence of the Israeli government, the United States proposes to allow defense counsel to only view the pathological reports and accompanying photographs and in-depth analysis of the bombs and materials used to construct the bombs. These documents may be viewed by defense counsel at the FBI.<sup>3</sup> No copies can be made. Counsel will be free, of course, to discuss what they have viewed with their clients. The contents of these documents, however, should not be disclosed to anyone else except in accordance with the terms of the Protective Order.

The proposed Protective Order provides that the defense shall not be permitted to make photocopies of the reports in question. This proposed restriction makes this case somewhat analogous to United States v. Kimbrough, 69 F.2d 723, 730-31 (5th Cir. 1995). In Kimbrough, the government declined to permit the defendant to make copies of child pornography. The government offered to allow the defendant to examine the pornography at an office while under monitoring or to take the pornography to the

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<sup>3</sup>At the insistence of the Israeli government, the addresses and Israeli identification numbers of the witnesses and victims of the violent acts will be redacted from the documents provided to the defense. Because this material, which is, in reality, Jencks Act material, is being provided far in advance of its legal obligation to do so, the defendants will suffer no prejudice from these redactions.

defendant's expert for testing. The defendant objected to this procedure. The trial court denied the defendant's motion for permission to make copies and the appellate court affirmed. There are two differences between Kimbrough and this case. The first is that child pornography is contraband and the defendant has no right to possess it. The second is that the trial court denied the defendant's motion to possess the pornography and to make copies of it even though the defendant was charged with the illegal receipt of that very child pornography. In this case, the medical reports and bomb technician reports are obviously not contraband. But, they contain sensitive information just like photographs of child pornography contain sensitive information, albeit of a different type. On the other hand, the reports do not constitute the corpus delicti of the crime itself. But, while there are differences, Kimbrough is instructive on the issue of the Rule 16 treatment of very sensitive information the defendant has a right and need to see. This Protective Order basically adopts the procedure proposed by the government in Kimbrough.

To date, the United States has produced a massive amount of discovery material to the defendants, including copies of the intercepted facsimiles and phone conversations charged in the Indictment as well thousands of hours of other intercepted conversations and thousands of pages of other intercepted facsimiles. Production of these materials will continue for several more weeks. Furthermore, defense counsel has had the ability to view all the evidence maintained by the FBI five days a week, eight hours a day, for many months. The incarcerated defendants have been housed locally for several weeks to view evidence and have, to date, viewed the financial



documents and the 1995 search warrant evidence. The accompanying Protective Order sought by the United States affects only a minuscule portion of the massive discovery in this case. Moreover, the government has prepared a descriptive list in English of the discoverable items contained with the Israeli documents, and is being revised it to include documents recently received from the State of Israel. The index, denoted Index "C," now runs for approximately 100 pages. This index provides a reviewer of the documents with key information about the nature and content of the documents themselves.

Accordingly, for the reasons stated above, the United States respectfully requests that the district court grant its motion for a Protective Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent  
by U.S. mail this 1<sup>st</sup> day of MARCH, 2004, to the following:

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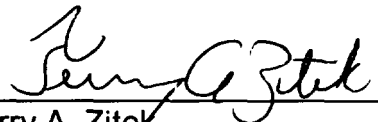
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UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

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SAMI AMIN AL-ARIAN,  
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**PROTECTIVE ORDER**

This matter comes before the Court upon the Government's Motion for Protective Order to prevent the unauthorized disclosure or dissemination of certain information and documents which will be reviewed by or made available to the defendants and/or defense counsel in this case.

Pursuant to the authority granted under Rule 16(d)(1) of the Federal Rules of Criminal Procedure and the general supervisory authority of the Court, it is

HEREBY ORDERED:

1. This Order pertains to all photographs, medical records and autopsy reports of victims of terrorist attacks committed by the Palestinian Islamic Jihad, reports prepared by bomb technicians who investigated such attacks, and any other material of a similar nature, which items were received by the United States Government from the State of Israel pursuant to a request under the authority of the Mutual Legal Assistance Treaty between the two countries, and which are to be produced to the defendants by the government during the course of discovery in this case. These items are herein collectively referred to in this Order as "sensitive information."

2. No person shall disclose any sensitive information to any person other than defendants, their defense counsel, witnesses being interviewed or prepared for trial, attorneys who are members of the Florida Bar or Federal Bars in Florida and assisting in preparation for trial, law clerks, paralegals, secretaries, translators, technical and other experts, and investigators involved in the representation of the defendants in this case.

3. The sensitive information will forever remain the property of the United States Government and shall remain in its continuous possession. Defense counsel shall not reproduce or photocopy any of this information.

4. If defendants or defense counsel disclose the contents of any sensitive information to any person described in paragraph (2), they shall provide such recipients with copies of this Protective Order and advise that person that the sensitive information is the property of the United States Government and that an unauthorized use may constitute a violation of law and/or contempt of Court.

5. Nothing herein constitutes a waiver of any right of any defendant, nor does anything herein restrict in any way the right of any defendant, nor does anything herein restrict in any way the right of the defense to use the sensitive information in connection with any pleading or proceeding in this case. If, however, the defendant desires to submit any of this information to the Court in connection with a pleading or proceeding in this case, the defendant will submit such sensitive information to the Court under seal.

6. A copy of this Order shall be issued forthwith to counsel for each defendant, who shall be responsible for advising his or her respective defendant, defense counsel employees and other members of the defense team, and defense witnesses of the contents of this Order.

Done and Ordered in Tampa, Florida on this \_\_\_\_ day of February, 2004.

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THOMAS B. McCOUN, III  
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:  
Counsel/Parties of Record